Supreme Court, U.S.
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No. ____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

JASON TODD AND JOSEPH HUGH HUTCHINSON, *Petitioners*,

v.

STATE OF FLORIDA, *Respondent*.

On Petition for a Writ of Certiorari to the
Florida First District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED

Subsection 2 of the Florida Criminal Mischief Statute provides that an act of criminal mischief causing between $200 and $1000 damage is a felony if committed against a "church, synagogue, mosque, or other place of worship, or any religious article contained therein." The same act is a misdemeanor if committed against secular property—the one exception being public telephone property. The trial judge found the petitioners guilty of violating Subsection 2. Under the Fourteenth Amendment, the questions presented are:

1. Does Subsection 2 violate the Establishment Clause by benefitting religious institutions without similarly benefitting a broad class of secular institutions?

2. Does Subsection 2 violate the Equal Protection Clause by punishing offenses against religious property more severely than identical offenses against secular property?

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In The
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JASON TODD AND JOSEPH HUGH HUTCHINSON, *Petitioners*,

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Petition for a Writ of Certiorari to the Florida First District Court of Appeal

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Jason Todd and Joseph Hugh Hutchinson respectfully petition for a writ of certiorari to review the judgment of the Florida First District Court of Appeal in this case.

OPINIONS BELOW

The opinion of the Florida First District Court of Appeal (App., *infra*, 1a-11a) is reported at 643 So.2d 625 (Fla.Dist.Ct.App. 1994). The opinion of the state circuit court (App., *infra*, 12a-13a) is unreported.

JURISDICTION

The Florida Supreme Court denied Jason Todd's petition for discretionary review on January 18, 1995 (App., *infra*, 67a-68a), and denied Joseph Hugh Hutchinson's petition on February 10, 1995 (App., *infra*, 69a-70a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Section 1 of the Fourteenth Amendment provides, in relevant part, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws."

Subsection 1 (a) of the Florida Criminal Mischief Statute, Fla.Stat. § 806.13 (1991), provides, in relevant part, that "[a] person commits the offense of criminal mischief if he willfully and maliciously injures or damages * * * any real or personal property belonging to another * * *." Under Subsection 1 (b)2, "[i]f the damage * * * is greater than $200 but less than $1000, it is a misdemeanor * * *."

Under Subsection 2, "[a]ny person who willfully and maliciously defaces, injures, or damages * * * any church, synagogue, mosque, or other place of worship, or any religious article contained therein is guilty of a felony of the third degree * * * if the damage to the property is greater than $200."

Under Subsection 3, any person who "willfully destroys or substantially damages any public telephone [property] * * * which destruction or damage renders a public telephone inoperative or which opens the body of a public telephone shall be guilty of a felony of the third degree * * * [if] conspicuous notice of * * * this subsection * * * shall have been posted * * *."

STATEMENT

The petitioners, Jason Todd and Joseph Hugh Hutchinson, were arrested in Columbia County, Florida in May 1992 and charged with three counts of criminal mischief under Subsection 2 of the Florida Criminal Mischief Statute. They were accused of spray-

painting three churches with anti-religious symbols and words, and causing between $200 and $1000 damage upon each church. In the Third Judicial Circuit Court of Florida, Todd and Hutchinson filed motions to dismiss. They argued, under the Fourteenth Amendment, that Subsection 2 violated the Establishment Clause and the Equal Protection Clause. Upon denial of their motions (App., *infra*, 12a-13a), they pled no contest, stipulated to a factual basis for the plea, and reserved their right to appeal. *Id.* at 3a. They were convicted and sentenced to serve 48 hours in jail, 150 hours of community service, and 15 years of probation. *Id.* at 3a, 16a-31a.

On consolidated appeals to the Florida First District Court of Appeal, they raised the same constitutional challenges. The district court of appeal affirmed. They filed separate[1] petitions for discretionary review in the Florida Supreme Court arguing that the district court of appeal's decision had directly passed upon the state and federal constitutionality of a state statute.[2] The court denied Todd's petition in a 5-0 order (App., *infra*, 67a-68a), and denied Hutchinson's petition in a 5-2 order (*id.* at 69a-70a).[3]

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[1]Todd had raised an unsuccessful sentencing challenge in the district court of appeal. On the basis of intra-district conflict, he filed a motion for rehearing en banc, which was denied. App., *infra*, 71a.

[2]Under article V, section 3(b)(3), of the Florida Constitution, state supreme court review of decisions "that expressly declare[] valid a state statute, or that expressly construe[] a provision of the state or federal constitution" is discretionary. Accordingly, petitions for discretionary review do not directly raise constitutional challenges, but attempt to show the state supreme court it has discretionary jurisdiction it should exercise.

[3]Under the internal operating procedures of the Florida Supreme Court, a panel of five of the court's seven justices receive copies of petitions

A. The Florida Criminal Mischief Statute

This case involves the constitutionality of Subsection 2 of the Florida Criminal Mischief Statute in light of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

With the exception of religious property and public telephone property, if a person "willfully and maliciously injures or damages" the property of another, and causes between $200 and $1000 damage, the offense is a misdemeanor under the Criminal Mischief Statute. Under Subsection 2, if a person "willfully and maliciously defaces, injures, or damages * * * any church, synagogue, mosque, or other place of worship, or any religious article contained therein," and causes over $200 in damage, the offense is a felony. Where damage is over $200, but less than $1000, the difference between a criminal mischief felony under Subsection 2, and a criminal mischief misdemeanor under Subsection 1, is the religious nature of the property. A legislative staff summary concerning the addition of Subsection 2, provides: "It is believed that legislation of this type is necessary to curtail the increasing number of criminal mischief acts committed in a place [sic] of worship and in cemeteries." App., *infra*, 75a. The Criminal Mischief Statute does not provide heightened protection for secular cemeteries.

Subsection 3 provides the other exception to the Criminal Mischief Statute's general provisions: If a person "willfully destroys or substantially damages any public telephone" property and consequently "renders a public telephone inoperative or * * * opens the body of a public telephone" the offense is a felony. This

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filed for discretionary review. Florida Supreme Court Manual of Internal Operating Procedures, §II A.1(a). If four members of the court agree, an order is entered either requesting briefs on the merits or denying review. *Id.* If, however, less than four members agree, "the case circulates to the two members of the Court not originally assigned to the panel." *Id.*

exception only applies, however, if "conspicuous notice" of the subsection has been posted.

This case presents two questions: First, whether the Criminal Mischief Statute, by providing additional protection to only religious property and public telephone property, violates the "broad class" requirement the Court has discussed in its Establishment Clause cases. Second, whether the Criminal Mischief Statute violates the Equal Protection Clause by punishing offenses against religious property more severely than offenses against secular property.

B. Proceedings Below

Todd and Hutchinson filed motions to dismiss in the trial court arguing Subsection 2 of the Criminal Mischief Statute violated the Equal Protection and Establishment Clauses under the Fourteenth Amendment.[4] In its order denying their motion, the state trial court followed the three prong test this Court announced in *Lemon v. Kurtzman*, *supra*: Governmental action must (1) have a valid secular purpose; (2) have an effect that neither advances nor inhibits religion; and (3) not foster excessive entanglement with religion. App., *infra*, 12a-13a.

The trial court concluded Subsection 2 had a valid secular purpose, and that there was no evidence it was wholly motivated by religious considerations. App., *infra*, 12a. Without citation to the record, the court found "places of worship [were] uniquely vulnerable" because "they [were] often vacant especially at night when acts of criminal mischief typically occur[ed]." *Id.* at 12a-13a.

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[4]In *Lee v. Weisman*, 112 S.Ct. 2649 (1992), the Court noted that it had "unanimously incorporated the Establishment Clause into the Due Process Clause of the Fourteenth Amendment and, by doing so, extended its reach to the actions of the States" in *Everson v. Board of Education*, 330 U.S. 1, 14-15 (1947). *Lee*, 112 S.Ct at 2673 n.4. "Since then, not one Member of th[e] Court has proposed disincorporating the Clause." *Id.*

Under the second *Lemon* prong, the court found Subsection 2 did not advance religion because it was "only a penalty enhancing statute that applie[d] to what would otherwise be unlawful conduct under" the Criminal Mischief Statute. *Id.* at 13a.

Dispensing with the Equal Protection argument, the court found that the "State ha[d] a compelling interest in protecting places of worship and all individuals who unlawfully vandalize[d] places of worship [were] treated equally just as all places of worship [were] treated equally under the law." App., *infra*, 13a.

In their consolidated appeals to the Florida First District Court of Appeal, Todd and Hutchinson cited *Texas Monthly, Inc. v. Bullock*, *supra*, and argued Subsection 2 of the Criminal Mischief Statute was unconstitutional because it elevated deterrence of criminal mischief upon religious property—and thus primarily benefitted religious institutions—without similarly benefitting a broad secular class. App., *infra*, 8a-9a. They also raised the Equal Protection challenge they had presented in the trial court. *Id.* at 10a-11a.

Affirming, the district court of appeal held Subsection 2 passed the *Lemon* test. App., *infra*, 10a. Analyzing the first *Lemon* prong (secular purpose), the court cited the legislative staff summary indicating increased punishment was necessary to deter crimes against religious property. *Id.* at 7a. On this basis, the court found "the *legislature's articulated purpose* was to deter criminal mischief," and that it, thus, could not "be said that the statute lacks a secular purpose." *Ibid.* (emphasis added). The court found that Subsection 2's purpose was only indirectly to benefit religious organizations because it "merely increase[d]" the punishment for vandalizing religious property. *Id.* at 8a. The court also found Subsection 2 satisfied the broad class requirement because "an increased penalty" under the Criminal Mischief Statute "also applie[d] to criminal mischief involving telephone services." *Ibid.*

In its analysis of the second *Lemon* prong (secular effect), the district court of appeal found the Criminal Mischief Statute

"clearly show[ed] that its primary *purpose* [was] to punish those who deface[d] all sorts of property." App., *infra*, 9a. (emphasis added). The observation did not address Subsection 2, or explain how it had a secular primary effect. The court conceded that "there [was] some benefit to religious institutions since there [was] greater deterrence for criminal mischief involving religious property," but dismissed such a benefit as permissibly incidental under *Bullock*. *Ibid.* The court found the Criminal Mischief Statute satisfied *Bullock's* broad class requirement because "an enhanced penalty also applie[d] to criminal mischief involving telephone services." *Ibid.*

The court held Subsection 2 did not violate the Equal Protection Clause because the difference in punishment it provided for offenses against secular and religious property was rationally related to a legitimate state interest—deterring acts of criminal mischief. App., *infra*, 10a. The court cited the legislative staff summary to buttress its claim that Subsection 2's heightened deterrence for the benefit of religious institutions served a legitimate state end. *Ibid.* Addressing the rational relationship prong of the Equal Protection analysis, the court simply concluded: "The Statute's enhanced penalties for acts against [religious institutions] are rationally related to a legitimate state interest." *Id.* at 10a-11a. Thus, the court, which found Subsection 2's benefit to religious institutions too attenuated to raise concern in the context of an Establishment Clause analysis, simultaneously found Subsection 2 rationally related to providing such institutions additional protection in the context of an Equal Protection Clause analysis.

REASONS FOR GRANTING THE PETITION

The decision below is erroneous, and the issues it addresses are important. As the district court conceded in this case, Subsection 2 provides religious institutions a benefit it does not provide secular institutions. This Court has held that state actions benefitting

religious institutions are unconstitutional unless provided either to an adequately broad class that includes similar secular institutions, or as a means of reducing a governmental burden upon religion. Statutes seeking to address crimes interfering with the practice of religion are abundant. This case presents the opportunity for the Court to resolve whether such politically popular measures are constitutional when they single-out religious institutions for protection not provided to secular institutions.

I. The Decision of the District Court of Appeal Is Erroneous.

In *Lemon v. Kurtzman*, *supra*, the Court articulated a tripartite test for determining whether a statute violates the Establishment Clause. A statute must: 1) have a secular purpose; 2) have a primary "effect that neither advances nor inhibits religion;" and 3) not foster "'excessive governmental entanglement with religion.'" 403 U.S. at 612-613 (quoting *Waltz v. Tax Commission*, 397 U.S. 664, 674 (1970). In *Texas Monthly v. Bullock*, *supra*, the Court clarified *Lemon* by explaining that state action benefiting religion cannot pass the first two *Lemon* prongs unless that benefit is merely incidental to religion's inclusion within a broad class that includes similar secular institutions. *Bullock*, 489 U.S. at 15-16. The Court noted an exception to the broad class requirement where the questioned benefit reduced the government's burden upon religion. *Id.* at 18 n.8. Subsection 2 fails to meet *Bullock's* broad class requirement, and it does not alleviate governmental intrusion upon religion.

A. In *Bullock*, the Court found a sales tax exemption for literature violated the Establishment Clause because it was limited to religious literature. The Court distinguished its prior decisions, including *Waltz v. Tax Commission, supra*, where it had approved governmental action that recognized and benefitted religions: "In all of these cases, however, we emphasized that *the benefits derived by religious organizations flowed to a large number of nonreligious groups as well.*" *Bullock*, 489 U.S. at 11 (emphasis added). The

Court continued: If "those benefits [were] confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular *purpose and effect*." *Id.* (emphasis added). The Court explained a law did not violate the Establishment Clause because its purpose or effect benefitted religion if that benefit was incidental to religion's inclusion in a broad class. "The *breadth* of New York's property tax exemption was essential to our holding [in *Waltz*] that it was not 'aimed at establishing * * * religion,' * * * but rather possessed the legitimate secular purpose and effect * * *." *Bullock*, 489 U.S. at 12 (emphasis added) (quoting *Waltz*, 397 U.S. at 674); *see also Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 794 (1973) (distinguishing *Waltz*, and finding narrowness of benefitted class important factor in assessing effect of legislation).

In *Waltz*, a property owner challenged a city tax exemption for religious institutions that was part of an exemption for various other organizations. 397 U.S. at 665 n. 1, 666. Upholding the exemption, the Court reasoned that the city had "granted exemptions to all houses of religious worship within a *broad class* of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.* at 672-673 (emphasis added). The Court did not base its determination upon the "'good works'" churches provide, *id.* at 673-674, but found the exemption was an accommodation that invited less entanglement than taxation. *Id.* at 673, 675. Since the exemption did not treat religious organizations with preference over other non-profit groups, the Court held it did not establish, sponsor, or support religion. *Id.* at 674.

With respect to the first prong of the *Lemon* test (secular purpose), the district court of appeal reasoned *Bullock* did not imperil Subsection 2 because deterring criminal mischief upon

religious property more severely than criminal mischief upon secular property did "not directly benefit religious organizations." App., *infra*, 8a. In its analysis of the second prong of the *Lemon* test (secular effect), the court conceded that Subsection 2 benefitted religious institutions, but claimed that benefit did not present a constitutional hurdle because it was "indirect" and, therefore, an acceptable "incidental[] benefit [to] religion" under *Bullock*. *Id.* at 9a. Both of these conclusions are circular and, thus, unresponsive to the broad class requirement the Court discussed in *Bullock*:

The term "incidental", as used in *Bullock*, refers to where "religious groups benefit incidentally" as part of their inclusion within a broad class. *Bullock*, 489 U.S. at 14-15. Whether a benefit such as protection from criminal mischief is incidental under *Bullock* thus hinges upon whether it is provided to an adequately broad class. *Id.; see also Widmar*, 454 U.S. at 274 (Court discussing term "'incidental' within the meaning of [its] cases," and holding public university should make forum available to religious speakers because forum would be "available to a broad class of nonreligious as well as religious speakers"); *cf. Zobrest v. Catalina Foothills School District*, *infra* (police protection benefit for purposes of broad class requirement). If a benefit flows only to institutions engaged in religious activity, it cannot be incidental. *But cf. Bradfield v. Roberts*, 175 U.S. 291, 297 (1899) (upholding aid to corporation whose members were all Catholic nuns running a charitable hospital, where the corporation's charter restricted it to secular activity). Subsection 2's heightened deterrence of criminal mischief benefits religious institutions exclusively. It is not incidental.

In a vigorous dissent, Justice Scalia derided *Bullock's* holding because he believed the tax exemption statute at issue was a reasonable accommodation of religion, and that the broad class requirement did not apply. *Bullock*, 489 U.S. at 29-45 (Scalia, J., dissenting). He pointed out that "[b]readth of coverage is essential to constitutionality whenever a law's benefiting of religious activity is sought to be defended not" on the basis of accommodation of

religion, "but as merely the incidental consequence of seeking to benefit *all* activity that achieves a particular secular goal." *Id.* at 40. Subsection 2 of the Criminal Mischief Act is not an accommodation of religion; it is an enhancement in punishment for the exclusive benefit of religion. The State and the district court of appeal have defended Subsection 2 on the basis that protecting property from criminal mischief is a legitimate secular goal. It is, but it must be pursued and achieved without preference for religious property. The district court of appeal's determination that Subsection 2 only incidentally benefits religious institutions as a consequence of pursuing this goal violates the principles Justice Scalia discussed in his *Bullock* dissent.

The Court has indicated there are benefits government can provide on the exclusive basis of religion without offending the Establishment Clause. In *Bullock*, the Court noted that "[c]ontrary to the dissent's claims," it was not "suggest[ing] that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs [were] forbidden * * * unless they [were] mandated by the Free Exercise Clause." *Bullock*, 489 U.S. at 18 n.8. The Court gave two representative examples: *Zorach v. Clauson*, 343 U.S. 306 (1952), and *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

Zorach was an Establishment Clause challenge to a statute allowing children to be released from public schools so that they could receive religious education. *Zorach*, 343 U.S. at 308. The Court upheld the statute on the basis that it was an accommodation of religion. *Id.* at 313-314. Similarly, *Amos* presented the question of whether a religious exemption in Title VII of the Civil Rights Act of 1964 violated the Establishment Clause. The Court rejected the argument that statutes giving special consideration to religious groups were per se invalid. *Amos*, 483 U.S. at 338. The Court explained: "Where * * * government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no

reason to require that the exemption come packaged with benefits to secular entities." *Id.* Neither *Zorach* nor *Amos* resemble this case because Subsection 2 does not accommodate religion.

The Court's recent decision in *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2466 (1993), does, however, provide a discussion of the type of governmental benefit that triggers a broad class analysis. In *Zobrest*, the Court indicated protection from criminal activity was a government benefit for purposes of the Establishment Clause breadth requirement. The Court observed: "[I]f the Establishment Clause bar[red] religious groups from receiving general government benefits * * * a 'church could not be protected by the police * * * department[] * * *.'" *Id.* at 2466 (Citing *Widmar*, 454 U.S. at 274-275) (internal quotation marks omitted in original)).[5] The Court explained such benefits to religious institutions could be permissible where the governmental action "neutrally provide[d] benefits to a *broad class* of citizens defined without reference to religion * * *." *Id.* (emphasis added).

The reasoning in *Bullock* and *Zobrest* follows a line of decisions recognizing the right of states to provide general governmental benefits to religious institutions where secular institutions similarly benefit. In *Roemer v. Board of Public Works of Maryland*, 426 U.S. 660, 746 (1976), the Court explained that "religious institutions need not be quarantined from public benefits that are neutrally available to all." The Court cited *Everson v. Board of Education*, 330 U.S. 1 (1947), where it had approved state-supplied school transportation for the benefit of students at both secular and sectarian schools, and *Board of Education v. Allen*, 392 U.S. 236 (1968), where it had allowed a state to loan secular textbooks to students at both secular and sectarian schools. In both

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[5]This language is taken from *Roemer v. Board of Public Works of Maryland, infra.*

Everson and *Allen*, as in *Waltz*, the Court relied upon the fact that the state was providing the questioned secular benefit to religious institutions as an incidental consequence of their inclusion within a class that could be defined in secular terms. The benefit was permissible, and did "not confer any imprimatur of state approval on religious sects or practices," *Widmar*, 454 U.S. at 274, because it was "part of a general program that '[was] in no way skewed toward religion.'" *Zobrest*, 113 S.Ct at 2467 (quoting *Witters v. Washington Department of Services for Blind*, 474 U.S. 481, 488 (1986)).

The district court of appeal reasoned the breadth requirement did not imperil Subsection 2 because of the additional protection Subsection 3 of the Criminal Mischief Statute provided public telephone property. App., *infra*, 8a-9a. However, the mere presence of one type of secular property receiving heightened protection does not rescue Subsection 2. Two types of property may create a class, but a class of two is certainly not broad enough to satisfy *Waltz*, *Bullock* and *Zobrest*.

Even if a class of two—one secular, one religious, and both receiving the same benefit in terms of deterrence from criminal mischief—could otherwise satisfy the broad class requirement, Subsection 2 would still fail: Deterrence under the Criminal Mischief Statute is not the same for religious and public telephone property. Subsection 3 only applies to public telephone property where (a) service has been disrupted; and (b) notice of the enhancement has been conspicuously posted. Subsection 2 applies to any criminal mischief upon religious property causing over $200 damage. Subsection 2 does not require notice, and it does not require that the functionality of the religious property be affected.

The district court of appeal was persuaded by the Illinois state court decision in *People v. Carter*, 228 Ill.App.3d 526,, 592 N.E. 2d 491, 170 Ill.Dec. 55 (Dist.Ct.App.1992), *appeal denied*, 146 Ill.2d 635, 602 N.E. 2d 461, 176 Ill.Dec. 807 (1992), *habeas corpus denied sub nom. U.S. ex rel. Carter v. Peters*, 1993 WL 335812 (N.D. Ill. 1993), *aff'd*, 26 F.3d 697 (CA7 1994), *cert. denied*, 115

S.Ct. 517 (1994) (App., *infra*, 5a-6a), a case in which the Court recently denied certiorari. *Carter* upheld a provision similar to Subsection 2. It should not have persuaded the district court of appeal, however, because it did not address the breadth requirement. The apparent reason *Carter* did not discuss the requirement was that the relevant provision *was* part of a very broad classification.[6]

Under *Bullock*, *Waltz*, and *Zobrest*, the State of Florida may not take action to additionally protect religious institutions from criminal mischief unless those institutions receive the enhanced protection incidental to their inclusion within a broad class.[7] Religious institutions are the exclusive beneficiaries of Subsection 2. The only secular property receiving heightened protection under the Criminal Mischief Statute is public telephone property, which only receives enhanced protection where damage interferes with the property's purpose and conspicuous notice of the additional punishment has been posted.

B. In assessing the Equal Protection Clause challenge, the district court of appeal correctly applied the rational basis test as the appropriate standard of review. App., *infra*, 10a. In doing so, however, the court again acknowledged that Subsection 2 benefits religion. The court justified its use of the rational basis test by citing *Amos*, 483 U.S. at 338-39, and stating: "[L]aws affording a uniform benefit to *all* religions should be analyzed under the rational basis test. Thus, the question before us is whether the

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[6]Chapter 38, Section 1005-5-3.2(a) of the 1989 Illinois Statutes included a list of 13 factors that could be used to enhance punishment. Only one concerned religion. The full text is included in the appendix. App., *infra*, 72a-73a.

[7]The State could, of course, raise penalties for *all* criminal mischief offenses in response to an increase in offenses upon religious institutions.

government has chosen a rational classification to further a legitimate end." App., *infra*, 10a.

The court found that the State of Florida had a legitimate interest in deterring acts of criminal mischief. To justify the heightened deterrence for religious property as a legitimate state end, the court relied upon the legislative staff summary (App., *infra*, 74a-75a) that opined: "It is believed that legislation of this type is necessary to curtail the increasing number of criminal mischief acts committed in a place [sic] of worship and in cemeteries."[8] *Id.* at 10a, 75a. The court referred to the staff summary as a statement of the "legislature's articulated purpose."[9] *Id.* at 7a. It is not. It is legislative history. Even if protecting religious property more than similar secular property were a legitimate state end, the court offered no reasoning to support its conclusion that Subsection 2 was rationally related to that end.

If the district court of appeal were correct that (a) any additional deterrence Subsection 2 provided religious institutions was so inconsequential as to eliminate Establishment Clause concerns in this case; and (b) the state had a legitimate need to protect religious property more than secular property, the heightened punishment meted out in the name of criminal deterrence would be so attenuated from its supposed purpose as to fail the rational relationship test. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship is so attenuated as to render the distinction arbitrary or irrational.") (citing *Zobel v. Williams*, 457

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[8]The Criminal Mischief Statute does not provide heightened deterrence for the benefit of secular cemeteries

[9]*See also* App., *infra*, 8a (discussing staff summary: "this stated legislative purpose, to which we give great deference").

U.S. 55, 61-63 (1982); *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973)).

Contrary to the court of appeal's decision, Subsection 2 of the Florida Criminal Mischief Statute violates both the Establishment Clause and the Equal Protection Clause. The Court should grant this petition to correct the Florida First District Court of Appeal's error.

II. The Question Presented Is Important.

In recent years, so-called "hate crime" legislation has been proliferating throughout the country. *See generally* Katz, Speak No Evil, Think No Evil: The Florida Hate Crime Law, 44 U. Fla. L. R. 695, 696 (1992). This Court struck St. Paul, Minnesota's Bias Motivated Crime Ordinance, St. Paul, Minn.Legis.Code § 292.02 (1990), in *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992), on First Amendment grounds because the challenged law "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 2542. In *Wisconsin v. Mitchell*, 113 S.Ct 2194, 2196-2197 (1993), the Court upheld Wisconsin's hate crime legislation, Wis.Stat. §§ 939.645(1)(b) (1990), which enhanced the respondent's sentence because he had chosen his battery victim on the basis of race. Both the ordinance in *R.A.V.* and the statute in *Mitchell* applied to a broad class of secular and religious victims. St. Paul, Minn.Legis.Code § 292.02 ("Whoever places [an item] * * * which one * * * has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of *race, color, creed, religion or gender* * * * shall be guilty of a misdemeanor.") (emphasis added); Wis.Stat. §§ 939.645(1)(b) (penalties for criminal activity enhanced where victim selected "because of the *race, religion, color, disability, sexual orientation, national origin or ancestry* of that person * * *.") (emphasis added). This case presents the opportunity for the Court to address the constitutionality of hate crime laws where they single-out religious institutions for enhanced protection secular institutions do not receive.

In 1988, Congress passed 18 U.S.C. 247, which, like Subsection 2 of the Florida Criminal Mischief Statute, elevated punishment for offenses against religious property. Act of June 24, 1988, Pub.L. 100-346, §1, 102 Stat. 644. As with Subsection 2, 18 U.S.C. 247 protects religious institutions without protecting a broad class of similar secular institutions.

Carter, *supra*, the Illinois decision upon which the district court of appeal relied, followed a New Mexico court's decision in *State v. Vogenthaler*, 548 P.2d 112 (N.M.Ct.App. 1976). *Vogenthaler* examined a church desecration statute, N.M.Stat. §40A-15-3 (1953), that singled-out religious property for the benefit of heightened deterrence. As with 18 U.S.C. 247 and Subsection 2 of the Florida Criminal Mischief Statute, the New Mexico statute did not provide heightened deterrence for the benefit of potential secular victims. *Vogenthaler*, 548 P.2d at 114-115.

Given the political popularity of hate crime legislation, and the presence of existing precedent erroneously upholding such laws where they single-out religious property for heightened protection not accorded secular property, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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